

**UNITED STATE OF AMERICA
NATIONAL LABOR RELATIONS BOARD
Region 9**

SHAMROCK CARTAGE, INC.	:	
	:	
Respondent,	:	
	:	
and	:	Case No. 09- CA-219396
	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 413	:	<u>RESPONDENT’S</u>
	:	<u>POST-HEARING BRIEF</u>
	:	
Charging Party.	:	
	:	

SHAMROCK CARTAGE, INC. (“Shamrock”) submits the following post-hearing brief of law and argument in the above-captioned case.

ISSUES

The Complaint in this case alleged several issues. Specifically, the issues are whether Shamrock violated Section 8(a)(1), (3), (4), and (5) of the Act when it suspended and ultimately terminated Shane Smith (“Smith”).

Through its Complaint, and during the course of the hearing, the General Counsel alleged a number of issues *inter alia*: (1) Shamrock violated 8(a)(1) when Brian Williamson (“Williamson”), at Respondent's Kraft Foods jobsite, threatened Smith with the more onerous working condition of working with "bad workers" because the Union rejected Respondent's proposal on discipline during contract negotiations; (2) Shamrock Violated Section 8(a)(1) and (5) when it suspended

Shane Smith without prior notice to the Union and (3) Shamrock violated Section 8(a)(1), (3) and (4) of the Act for suspending and terminating Shane Smith.

STATEMENT OF THE CASE

A. Statement of the Facts

Smith is the appointed steward for the International Brotherhood of Teamsters Local 413 ("Union") at Shamrock. (Tr. 60). Shamrock and the Union are currently bargaining for an initial agreement. (Tr. 61). Smith attends all bargaining sessions between Shamrock and the Union. (Tr. 62). Around April 5, 2018, Theodore Beardsley ("Beardsley"), union business agent, and Smith met with Michael Holmes ("Holmes") and Jim Allen ("Allen") as part of the bargaining for the initial collective bargaining agreement ("CBA"). (Tr. 63)

During this bargaining session, Allen passed across a proposed progressive discipline policy on behalf of Shamrock. (Tr. 63). Beardsley refused to accept the proposed progressive discipline policy absent "just cause" language. (Tr. 63). The discipline policy proposed by Allen was not tentatively agreed to at the April 5th bargaining session. (Tr. 63-64). Shamrock and the Union continued bargaining for an initial agreement. (Tr. 61).

Smith returned to his regular shift at Shamrock on Monday, April 9, 2018. (Tr. 199). As union steward, Smith kept members informed about what happened during bargaining sessions. (Tr. 195-196). Neither Smith nor anyone else discussed

the previous week's negotiations with Shamrock supervisor, Williamson. (Tr.86-87 Tr. 227 Tr. 284-285 Tr. 365). Williamson has never attended any bargaining sessions between the Union and Shamrock. (Tr. 86-87. Tr. 284). Williamson is not privy to what happens during bargaining sessions. When Smith returned to work that Monday, Williamson possessed no knowledge that a progressive discipline policy had been passed across the table, or that the union had rejected the policy proposed by Shamrock. (Tr. 86-87. Tr. 227. Tr. 284-285) Williamson and Smith had a conversation on the morning of April 9, 2018, but Smith never mentioned the Union's rejection of Shamrock's proposed progressive discipline policy. (Tr. 227 Tr. 284-285).

Later the same day, while on lunch break, Smith contacted a vendor for Shamrock's clients DHL and Kraft Foods, PINC. (Tr. 209). PINC provides logistics equipment and software used by Shamrock to perform its work for DHL and Kraft. (Tr. 378-379). Shamrock is not a customer of PINC directly and does not have an account with PINC. (Tr. 378-379). The equipment and services provided by PINC are the property of Kraft and Shamrock does not have authority to order or change services or equipment provided by PINC to the site. (Tr. 377-379).

Smith's call was to PINC's technical support line to troubleshoot the computer tracking system in the truck he was using, truck 263. (Tr. 206-211). Shamrock employees have permission from DHL and Kraft to contact PINC for technical

support of the equipment Shamrock utilizes in performance of its duties. (Tr. 371-372).

After troubleshooting the PINC system in Truck 263, Smith inquired “out of curiosity” about a previous purchase order for Truck 261. (Tr. 211-213). Smith, by his own admission, did not have authority to make the inquiry about a purchase order. (Tr. 229).

Smith went beyond the simple “out of curiosity” inquiry which he admitted was not permitted. (Tr. 214-215; 229). Smith suggested that Jerry Craft (“Craft”), PINC’s Marketing Manager, send out an email to several members of management regarding this purchase order. (Tr. 213-215). Williamson and members of management from DHL and Kraft received an email from Craft in response to Smith’s unauthorized request. (Tr. 325-327). The email contained the original purchase order and an inquiry about the party responsible for the purchase order. (Tr. 325-327). Williamson forwarded this email to owners Dan O’Brien (“O’Brien”) and Matt Harper (“Harper”). (Tr. 326-327).

After receiving the forwarded email, O’Brien contacted Holmes. (Tr. 340). O’Brien told Holmes, “Look, we don’t know what he’s doing right now. We don’t know who he’s contacting. We don’t know what’s going on. He needs to leave the property.” (Tr. 340; 4-15). Holmes contacted Williamson and told him to have

Smith leave the property. (Tr. 340). Smith was suspended with pay and asked to leave the property. (Tr. 223).

Smith inquired as to the reason of his suspension. (Tr. 218). Smith asked if he was being suspended because he contacted PINC and because of the email from Craft. (Tr. 218). Williamson confirmed that Smith was being suspended for contacting PINC regarding truck 261 and the subsequent email from Craft. (Tr. 218).

Smith told Williamson that he would contact the union and that he would get his job back with pay. (Tr. 219 Tr. 359). Before he left, Smith said, "And when I'm back, you're done!" (Tr. 359 Tr. 289-290). Shamrock was concerned about these statements because Smith has a documented history of workplace harassment and violent behavior. (Tr. 171-172; 255; 261-262). After Smith's termination in 2017, he jumped on Clarkson's truck, called her a "fucking bitch" and "fucking cunt." (Tr. 255; 257). Smith told Clarkson that whenever the union got his job back, that he would be back and that he would rip her out of her truck. (Tr. 255). Clarkson testified that she was scared when Smith jumped up on her truck. (Tr. 257-258). When she found out Smith was returning to work, it scared her. (Tr. 262). Clarkson went down to the police station and filed a report in case Smith tried to jump on her truck again. (Tr. 261-262). (Em. Exh. 2).

Smith did not wait for the union to vindicate what he thought was an unfair suspension. Ignoring the due process and safeguards provided by the union, Smith took it upon himself to contact Craft at PINC a second time, the exact act that Smith admitted caused his suspension. (Tr. 231-234). Smith knew he was being suspended for calling PINC and speaking to Craft. (Tr. 218). This fact did not deter Smith from contacting PINC again, not about technical support, but about the very purchase order that he admitted was an unauthorized purpose. (Tr. 219). Smith made his second unauthorized call to Craft at PINC after Williamson instructed him to leave the property due to his suspension with pay. (Tr. 234).

Immediately following Smith's suspension, Holmes contacted Beardsley and Clement Tsao ("Tsao"), the union's attorney, to inform them that Smith had been suspended for his unauthorized contact with PINC's marketing manager about a purchase order. (Tr. 343). Within a couple of days, Shamrock and the Union bargained over Smith's termination. (Tr. 343-344). During this bargaining, Smith gave his version of what happened on April 9th. (Tr. 344). The employer informed the union that they would investigate the matter further. (Tr. 344). Following the employer's investigation, the union was notified of the Shamrock's decision to terminate Smith on April 13, 2018. (Tr. 222-223).

B. Procedural Posture

The Union filed an Unfair Labor Practice Charge in this matter with Region 9 of the National Labor Relations Board on May 1, 2018. The initial charge alleged violations of 8(a)(3) for terminating Smith, 8(a)(5) for not bargaining over Smith's suspension, and as a result a violation of 8(a)(1). The first amended charge was filed on June 12, 2018. This amended charge alleged that Williamson had threatened Smith, an additional violation of 8(a)(1). The second amended charge was filed on June 20, 2018. The second amended charge alleged violations of 8(a)(4).

The Board asked Shamrock to respond in writing and by affidavit to the charges. Shamrock submitted a position statement and with evidence requests. Following this investigation, the Board filed a Complaint. A hearing was held on November 5, 2018 at the National Labor Relations Board, 550 Main Street, Room 3003, Cincinnati, Ohio in front of an Administrative Law Judge, the Honorable Andrew S. Gollin. At the completion of the hearing, Judge Gollin requested post-hearing briefs from the parties.

SUMMARY OF THE ARGUMENT

Smith was terminated for cause. Smith was suspended and terminated because he made an unauthorized inquiry to PINC regarding a purchase. His inquiry led to emails to Shamrock's clients DHL and Kraft and put Shamrock's contract with those clients in jeopardy. This unauthorized contact created an exigent circumstance

because the owners were fearful that Smith's actions may adversely impact or even cause cancelation of Shamrock's contract. Because of this exigent circumstance, Shamrock immediately suspended Smith with pay and asked him to leave the work site.

Holmes contacted the Union immediately to notify it that Smith was suspended with pay. A couple days following Smith's suspension, Shamrock and the Union bargained over Smith's discipline. Smith was present at the bargaining session and given the opportunity to explain his actions. Smith confirmed that he contacted PINC about a purchase. Smith did not deny his actions. The Company investigated the matter further following the bargaining session. On or about April 12, 2018, Shamrock notified the union that it had decided to terminate Smith.

Williamson did not know that Shamrock had proposed a discipline policy or that the Union had rejected Shamrock's proposed discipline policy. The General Counsel presented no evidence supporting the allegation that Williamson threatened Smith with more onerous working condition of working with "bad workers" *because* the Union rejected Shamrock's proposal on discipline during contract negotiations. The unrefuted testimony of Holmes, Beardsley, and even Smith himself demonstrates that none of them told Williamson about the proposed discipline policy. (Tr. 123). Williamson did not attend this bargaining session. General Counsel offered no other evidence or explanation on how Williamson could have

possibly known about the Union's rejection of the policy. The allegation is inherently false. This unsubstantiated allegation is the only instance of post-settlement union animus that the General Counsel proffered at hearing.

General Counsel's witness, Jason Caccamo ("Caccamo"), provided prejudicial testimony about Shamrock's alleged actions and animus during the contentious organizing campaign of 2017. Caccamo's testimony only provided evidence of animus prior to the settlement agreement between the parties executed on or about November 2017.

The General Counsel failed to offer any credible, or in fact, *any* evidence of continued union animus after the settlement agreement. The testimony of all parties demonstrates that the dispute of 2017 was placed in the rearview. The unrefuted testimony of Beardsley, Holmes, and even Smith demonstrated that the parties have been diligently engaged in good-faith bargaining for an initial CBA.

The original charge did not allege Williamson threatened Smith. This allegation was introduced in the first amended charge, forty-two (42) days after the original charge was filed. It is completely implausible that such a smoking gun allegation of a threat from a supervisor would have been excluded from the union's original filing in May when the facts were most recently present in the minds of the participants.

In the Second Amended Charge, filed fifty (50) days after the initial charge, the General Counsel changed its theory adding a claiming of an 8(a)(4) violation. Despite this addition, the General Counsel provided no nexus to any participation in Board proceedings by Smith and Shamrock's job action against him.

General Counsel failed to establish a *prima facie* case under the Board's long-held *Wright Line* standard. The General Counsel provided no evidence of current union animus, no evidence of protected activity, did not establish that Williamson or any agent of the employer had any knowledge of protected activity, and no evidence that Smith was terminated for the same.

The General Counsel's own witness and the alleged discriminatee, Smith refutes each element of the *prima facie* case. Smith's testimony demonstrated that the parties were bargaining in good faith contrary to any finding of union animus. Smith admitted that he was unauthorized to make the inquiry to PINC and further admitted that the inquiry was the reason for his suspension and ultimate termination.

Smith's testimony further demonstrated that the parties bargained in good faith over his ultimate termination and that the Company only made its decision after such bargaining. Finally, Smith discredits the General Counsel's claim that the parties were required to and failed to bargain over his suspension. Smith testified that he was suspended with pay. Because his suspension was with pay it did not

meet the “core components” requirement under *Total Security* to trigger mandatory bargaining.

Even if, and in spite of the paucity of evidence to establish a *prima facie* case under *Wright Line*, the Board should determine the General Counsel met its *prima facie* burden, Shamrock has met its burden of demonstrating that Smith was terminated for a legitimate business reason and “but for” the unlawful motivation would have still been terminated. Any employee would have been terminated for the same or similar actions as Smith.

For the foregoing reasons, Shamrock respectfully requests the Board find that no violation of the Act has occurred. Shamrock further respectfully requests the Board dismiss all charges in the instant matter

LAW & ARGUMENT

The Board established in *Wright Line*, 251 NLRB 1083(1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982) that in order to establish discrimination in the terms and conditions of employment in violation of the Act, the General Counsel must establish a *prima facie* case for such alleged discrimination. General Counsel must show the existence of protected activity, knowledge of that activity by the employer, or union animus, and that such protected activity or union animus was a factor in the adverse employment action. *Id.* The employer may rebut the *prima facie* case by showing that prohibited motivations

played no part in its actions. *Id.* If the employer cannot rebut the *prima facie* case, it can show that the same personnel action would have taken place for legitimate reasons regardless of the employee's protected activity. *Id.*

Employers that proffer a facially nondiscriminatory reason for termination must overcome the allegation that the reason was in fact pretext and that the real reason was an employee's protected activity or based on union animus. *Murd Indus.*, 287 NLRB 864 (1987)(citing *KellerMfg. Co.*, 237 NLRB 712, 717 (1978) ("A pretextual reason, of course, supports an inference of an unlawful one"). The Board will look at circumstantial evidence of motivation to determine if the employer acted unlawfully. *Wright Line*, 251 NLRB 1083 (1980).

A. Shamrock terminated Smith for a legitimate business reason.

It is undisputed that Smith was not authorized to speak with PINC's Marketing Manager about a previous purchase order. Smith's own unrefuted testimony confirmed he was not authorized to make such an inquiry. The unrefuted testimony of Holmes, Williamson, Caccamo, and even Smith established that no one from Shamrock, including supervisors, were authorized to contact PINC regarding purchase orders. PINC is Kraft's vendor and any authority possessed by Shamrock flows through Kraft. The evidence presented showed upon receipt of Craft's indicating Smith had inquired about a purchase order, Shamrock was afraid that it would lose its contact with DHL/Kraft.

Shamrock's handbook expressly prohibits any employee "whose regular duties do not include purchasing" to incur any expense on behalf of Shamrock or "bind Shamrock by any promise or representation without express written approval." (J10, page 42, Rule 6.13). Smith received Shamrock's handbook. (R3).

Smith admitted he acted outside his authorization. His action could have either resulted in Shamrock incurring expense, or its clients incurring expense thus jeopardizing Shamrock's continuation of its relationship. Smith was suspended with pay pending investigation and bargaining. When notified of the suspension, Smith threatened Williamson. The threat to Williamson cannot be downplayed in light of Smith's history of threats and violence. (R2).

The evidence, and even Smith's own testimony, demonstrate that he was suspended and ultimately terminated for his unauthorized contact with PINC. The General Counsel proffered no nexus to refute Smith's testimony that his termination was for legitimate business reasons.

No evidence was proffered contradicting Smith's own testimony and establishing any nexus between his termination and any protected activity or union animus. Even if the General Counsel was successful in convincing the Board that such nexus existed, the Employer's burden to demonstrate a legitimate non-pretextual reason was clearly established by Smith's testimony.

1. General Counsel Has Not Met Its Burden of Establishing a *Prima Facie* Case.

General Counsel offered no evidence, direct, indirect, or circumstantial, that Smith was unlawfully terminated or terminated for any other reason other than the reason given. *Wright Line* requires that protected conduct be a motivating or substantial factor in an employee's discharge. *NLRB v. Wright Line*, 662 F.2d 899, 904 (1st Cir. 1981).

The General Counsel spent much of its case re-litigating the union animus from the organizing campaign of 2017. Shamrock acknowledged its violation in 2017 and entered into a voluntary settlement agreement with the Board. The General Counsel offered no evidence demonstrating that Shamrock was not in compliance with the settlement, or that any default proceedings for non-compliance had been initiated. More importantly, the General Counsel did not offer any evidence demonstrating any union animus *contemporaneous* to the time relevant to the instant matter.

General Counsel did not present any evidence that protected conduct was a motivating or substantial factor in Smith's discharge. In fact, at no time did the General Counsel make any direct assertion as to the motivation for Smith's termination. Rumor or innuendo concerning behavior already remedied through settlement, in which Shamrock voluntarily confessed and entered into, does not meet the requirement of demonstrating animus

contemporaneous to the alleged discrimination. The evidence and testimony demonstrated that the parties have moved on from the previous dispute and were engaged in good faith bargaining for an initial collective bargaining agreement.

2. Shamrock has proven that Smith's Termination was lawful.

If protected conduct can be established as a motivating or substantial factor in discharge, the employer must show by preponderance of the evidence that the discharge would have occurred "but for" the protected activity. The evidence presented did not establish that protected conduct was a motivating factor in Smith's discharge. All the evidence presented, including Smith's own testimony, indicates that the only motivating factor for terminating Smith was his contact with Kraft's vendor, PINC.

However, the evidence and testimony did demonstrate that Shamrock terminated Smith for his unauthorized contact with PINC. Smith himself testified to this undisputed fact.

Smith also testified that he called PINC back after being suspended for calling PINC. His actions in that regard were blatant insubordination. Insubordination is adequate cause for discharge. *N.L.R.B. v Local Union No. 1229, Int'l Bhd. Of Elec. Workers*, 346 U.S. 464, 475 (1953).

Finally, Smith's threat against Williamson provided yet another justification for his termination. His history of violence on the jobsite made the threats a salient concern for Shamrock.

The General Counsel will likely argue that shifting justifications are evidence of unlawful intent. Quite the contrary, it has been demonstrably stated by Shamrock at every stage of this proceeding that the reason for Smith's termination was his unauthorized contact with PINC which jeopardized its business relationship with DHL and Kraft. The insubordination and threats are additional grounds for termination that occurred after Smith's unauthorized contact with PINC, but Shamrock stands firm that its primary motivation was the unauthorized contact that resulted in Smith's termination.

B. Shamrock Did Not Violate 8(a)(5) Because the Union Was Immediately Notified of Smith's Paid Suspension and Was Given an Opportunity to Bargain Prior to Smith's Termination.

The Board gave exception to mandatory bargaining, "[A]n employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain in any situation that presents exigent circumstances: that is, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel." *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, 9.

(2016). The Board additionally held that bargaining before discretionary discipline such as a suspension is imposed when such affects the core terms or conditions of employment. *Id.* At 6. Smith's status, tenure, wages, nor benefits were affected by the suspension with pay. No obligation under *Total Security* or its progeny attached to the suspension. Even if the Board should determine that this suspension with pay affected Smith's core terms and conditions of employment, Shamrock did not have a duty to bargain prior to Smith's suspension because it possessed a reasonable, good-faith belief that Smith's unauthorized contact with PINC posed a serious imminent danger to its business. (Tr. 340; 4-15).

When an employer suspends an employee pending an investigation the employer, "should promptly notify the union of its action and the basis for it and bargain over the suspension after the fact, as well as bargain with the union regarding any subsequent disciplinary decisions resulting from the employer's investigation." *Id.* at 9, Fn. 20. The Union was promptly notified that Smith had been suspended and the reasons for his suspension. Smith testified that he was suspended at approximately 5:00, 5:30 p.m. (Tr. 217). Beardsley testified that he had a voicemail from Holmes when he checked his voicemail between 5:30 p.m. and 6:00 p.m. And then, Beardsley spoke with Holmes and was informed of Smith's suspension. (Tr. 65). They set up a meeting to bargain about Smith's suspension and subsequent

termination. (Tr. 65-66). Shamrock met all the requirements of the Act and Board case law concerning bargaining over discipline.

C. Brian Williamson Never Threatened Smith with More Onerous Working Conditions.

Smith alleged that Williamson threatened to put “bad workers” on his shift, specifically, Shawn Soward. (Tr. 202-203). Smith claims that Williamson told him that they were going to fire him [Soward] and not bring him back. (Tr. 203, 12-14). General Counsel then asked, “What happened next in this conversation?” (Tr. 203, 15-16). Smith then testified “...bring back all the bad workers, I was going to place on you.” (Tr. 203, 19-23).

What is Smith's claim? Is Soward not going to be brought back or is he? Smith's inconsistency during this line of questioning rendered his testimony incoherent. Smith's accusation that Williamson threatened to bring back Soward was not consistent with his clear testimony that Soward was not going to be brought back. Soward was terminated the week of March 28, 2018. (Tr. 322; GC. Exh. 12(c)).

- 8 Q. What did Mr. Williamson tell you in
9 response to that?
10 A. He brought out the point that
11 since -- with him, he brought out the point
12 that since he got mouthy with the manager after
13 two days, they were going to fire him and not
14 bring him back.
15 Q. So what happened next in this
16 conversation?
17 A. Okay. Then -- then -- then --
18 basically -- okay. He -- basically, Brian

19 said -- he said after talking to the -- talking
20 to the manager, he -- okay. Brian said after
21 he talked to the manager, that all the good
22 workers, he was going to bring -- bring back
23 and all the bad workers, I was going to place
24 on you.

Williamson testified that Smith requested Soward be switched to Kraft because he was no longer eligible to work at Pepsi. (Tr. 282-283). Williamson's comments about Soward were sarcastic and he never mentioned anything about a proposed discipline agreement. (Tr. 283).

Williamson never mentioned the Union's rejection of Shamrock's proposed discipline policy because Williamson had no knowledge of a proposed policy. (Tr. 284-285). Beardsley, Smith, and Holmes all testified that they never relayed any information regarding the bargaining session to Williamson. Williamson testified that once he became a supervisor, he was never informed on the progress of union negotiations. (Tr. 284). Williamson testified that the only time he was privy to any information regarding the union is when Holmes contacted him to place postings in the trucks pursuant to the settlement of the Board charges from the Fall of 2017. (Tr. 285).

Summary

General Counsel failed to provide reliable evidence that Shamrock Cartage, Inc. violated any provisions of the NLRA. Whether the violation sought to be proved was an 8(a)(1), 8(a)(3), or 8(a)(4) General Counsel failed to establish a *prima facie* case. Even if the Board determined that a *prima facie* case has been established, Shamrock established by preponderance of the evidence that its decision to terminate Smith was for a lawful, legitimate reason. The evidence and testimony of the General Counsel's witnesses established that the parties bargained over all mandatory subjects of bargaining and no 8(a)(5) violation occurred.

For the foregoing reasons, Shamrock requests that all charges be dismissed.

Dated: November 27, 2018

Respectfully submitted:

By: /s/ Karen Rose

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Certificate of Service

I hereby certify that I served the attached Respondent's Brief on November 27, 2018 to the Administrative Law Judge via the Agency's e-filing portal and on the following parties by electronic mail:

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